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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SIDNEY SCHOLL and FELTON A. SPEARS, JR., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WASHINGTON MUTUAL BANK, FA (aka WASHINGTON MUTUAL BANK); FIRST AMERICAN EAPPRAISEIT, a Delaware corporation; and LENDER'S SERVICE, INC.,

Defendants.

CASE NO.: 5:08-CV-00868 RMW

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO STAY PROCEEDINGS

DATE: **July 25, 2008**
TIME: **9:00 a.m.**
CTRM: **6, 4th Floor**

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I. INTRODUCTION

By this motion, Plaintiffs respectfully ask this Court to exercise its discretion and stay this case, pending the resolution of Plaintiffs' Motion For Transfer of Tag-Along Action to MDL No. 1919.

II. FACTUAL SUMMARY

This is a putative class action against Washington Mutual Bank, FA ("WaMu"), First American eAppraiseIT ("EA"), and Lender's Service Inc., ("LSI") (collectively "Defendants") brought by Felton Spears and Sidney Scholl ("Plaintiffs") on behalf of themselves and a nationwide class of consumers who, on or after June 1, 2006, received unlawful, false appraisals that WaMu procured for Plaintiffs through either EA or LSI in connection with home loans from WaMu.

Plaintiffs and members of the class financed home purchases through WaMu. Prior to obtaining the loan, WaMu required the buyer to pay for a purportedly independent professional appraisal that WaMu procured for them to determine the fair market value of the property and ostensibly to justify the amount of the loan.

A real estate appraisal is supposed to be an independent, objective, impartial, unbiased, credible professional estimate of the fair market value of a particular property. Appraisers are to follow federally accepted standards, the Uniform Standards of Professional Appraisal Practice ("USPAP"), which govern the ethical and legal aspects of the appraisal undertaking, assessment, reporting and review process, and establish the minimum standards for performing a "credible appraisal". Under USPAP, an appraiser and an appraisal reviewer must perform assignments with impartiality, objectivity, and independence, and without bias or accommodation of personal interests. In appraisal practice under USPAP, an appraiser and an appraisal reviewer must not perform as an advocate for any party or issue, must not accept an assignment that includes the reporting of predetermined opinions and conclusions or favors the cause of any client, must not communicate assignment results or write a report in a misleading or fraudulent manner, and must not permit an employee or other person to communicate a misleading or fraudulent report.

As alleged in the complaint, in or about June 2006, WaMu entered an agreement, conspiracy or scheme with EA and LSI, two purportedly independent appraisal companies, to handle all of WaMu's home loan appraisals for WaMu borrowers. As part of this arrangement, EA and LSI received appraisal requests from WaMu, procured local appraisers to perform the appraisals, reviewed the appraisal reports, and requested at the behest of WaMu that the appraisers make changes before finalizing the reports and providing them to WaMu to transmit to the borrowers. In reality, WaMu, with the full, unfettered cooperation of EA and LSI, controlled the process by which individual appraisers were selected, how home appraisals were performed and ultimately the values at which properties were appraised. EA and LSI consulted directly with WaMu and its loan officers to establish the property values they desired before EA and LSI (and its appraisers) finalized the appraisal reports. This conspiratorial conduct allowed WaMu to direct appraisers to artificially inflate home values and thus provide false appraisals in order to qualify more people for higher value loans. WaMu would then aggregate and package these home loans and sell them in the financial markets for a substantial profit.

As part of the scheme, EA and LSI each received millions of dollars in appraisal fees from unsuspecting WaMu borrowers who, despite paying for what should have been credible appraisals (*i.e.*, done in compliance with applicable legal and professional standards so as to provide an independent, unbiased, and objective appraisal of the fair market value of their property), they instead unwittingly received biased appraisals that were neither independent, objective or in compliance with legal and professional standards and therefore, in fact, were not appraisals at all. Each borrower was charged for a credible, lawful appraisal, but as a result of the arrangement between WaMu, EA and LSI, no credible, lawful appraisal was performed and instead they received nothing more than a false, sham appraisal that had no real value. WaMu borrowers (*i.e.*, Plaintiffs and the Class) were damaged thereby.

The complaint alleges that Defendants' conduct violates the Real Estate Settlement Procedures Act, 12 U.S.C. Section 2607, the unlawful, unfair and fraudulent prongs of California's Business and Professions Code Section 17200, *et seq.* (the "UCL") as well as the Consumer Legal Remedies Act ("CLRA"). Defendants' conduct also constitutes an unlawful civil conspiracy.

Defendants' conduct also breaches their contracts with Plaintiffs and the Class, either directly or because Plaintiffs and Class members are intended beneficiaries of the contracts, or Defendants' services, or is grounds for restitution on a quasi-contract/unjust enrichment basis.

III. PROCEDURAL SUMMARY

A. Procedural Summary Before the Judicial Panel on Multidistrict Litigation

On November 1, 2007, the New York Attorney General ("NYAG") filed a complaint against First American eAppraiseIT, an appraisal management company ("AMC"), for its role in participating in a conspiracy with WaMu to provide artificially high home appraisal values. The NYAG's complaint also alleged a third company, Lenders Services, Inc., also participated in the conspiracy with WaMu and EA to provide fraudulent appraisals.

Soon after the NYAG filed its complaint, multiple individual and class actions were filed against WaMu alleging a variety of causes of action including securities fraud, derivative actions, and ERISA claims, each premised specifically on the NYAG's allegations of the WaMu-EA conspiracy. [See Docket No. 88 Plaintiffs' Brief in Support of Motion for Transfer of Tag-along Action to MDL NO. 1919].

On November 28, 2007, WaMu Moved the Panel to centralize all of the actions and transfer them to the United States District Court for the Western District of Washington. *Id.* at p. 2. WaMu argued that transfer of the actions for coordinated pretrial proceedings was appropriate because nearly all of the complaints had the same underlying factual allegations regarding WaMu's alleged conspiracy with its AMCs. *Id.*

On February 8, 2008, Plaintiffs filed their action in the United States District Court for the Northern District of California, on behalf of themselves and a class of WaMu borrowers nationwide alleging the conspiracy among WaMu, EA and LSI as the basis for their consumer claims. As with the securities, derivative and ERISA actions, the gravamen of Plaintiffs' complaint is that WaMu entered into a conspiracy with EA and LSI, in an effort to artificially inflate home mortgage loans, with the ultimate goal of securitizing them and selling them in the financial markets.

As Plaintiffs' case shares the identical factual bases as the securities, derivative and ERISA actions filed against WaMu, WaMu noticed Movants' action as a tag-along action pursuant to 28 U.S.C. § 1407 on February 15, 2008. *Id* at p. 3.

On February 21, 2008, less than one week after WaMu noticed Plaintiffs' action as a tag-along to the derivative, securities and ERISA actions, the Panel issued a Transfer Order centralizing most of the actions then pending against WaMu and transferring them to the United States District Court for the Western District of Washington before the Honorable Marsha J. Pechman. The Panel neither mentioned nor considered Plaintiffs' action in its Transfer Order for MDL 1919 despite its factual similarities to the other actions transferred. *Id.* Instead, Plaintiffs were notified by the Clerk of the Panel that WaMu's Notice of Tag-along Action was administratively denied as being "not related" to MDL 1919 by indicating "No Action Taken" on the Panel's Case Listing Report. The Clerk did not specify a reason why Plaintiffs' action was deemed "not related."

Despite the Panel's Clerk's administrative determination that Movants' action was "not related," Plaintiffs believe, as does WaMu, that the factual claims underlying their action are identical to the other actions already centralized in MDL 1919, making transfer of their action pursuant to Rule 1407 appropriate for coordination of pre-trial proceedings and to avoid duplicative discovery and inconsistent pre-trial rulings. Accordingly, on June 19, 2008, Plaintiffs filed a Motion for Transfer of Tag-Along Action with the Judicial Panel on Multidistrict Litigation. The Panel's Clerk has advised Plaintiffs' counsel that this Motion for Transfer likely will be scheduled by the Panel for a hearing in September, 2008.

B. Procedural Summary of the Case at Bar

This matter was originally filed on February 8, 2008. An amended complaint ("FAC") was filed on March 28, 2008. The matter was assigned to the Honorable Magistrate Howard R. Lloyd. On May 9, 2008, Defendant EA filed notice of their refusal to consent to this matter being heard by Magistrate Lloyd and the case was subsequently reassigned to this Court on May 12, 2008. Defendants have since each moved to dismiss the FAC and parties have stipulated to a briefing schedule which culminates with a hearing on Defendants' motions on August 15, 2008. The Court has ordered a case management conference for August 29, 2008 and further ordered that a joint case

management conference statement be filed by August 22, 2008. Parties have already met and conferred pursuant to this Court's CMC order dated May 15, 2008 and Plaintiffs have since propounded discovery to each Defendant consisting of 54 document requests.

IV. ARGUMENT

It is well-established that this Court has discretion to control its docket and the pace of proceedings before it in the interests of justice and judicial economy. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, fn. 23, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983) (recognizing that court may stay case in its discretion to control its docket); *Adams v. California Dept. of Health Services*, 487 F.3d 684, 688 (9th Cir. 2007) (district courts retain broad discretion to control their dockets). Indeed, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 81 L. Ed. 153 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.*

In considering a motion to stay, a court should consider the interest of judicial economy and efficiency, and the potential prejudice or hardship to the parties. *Rivers v. Walt Disney Co.*, 980 F.Supp. 1358, 1360 (C.D. Cal. 1997). Specifically, where an MDL transfer is pending, three factors should be balanced to determine whether a stay meets this standard: (1) potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases are in fact consolidated. *Id.*

A. No Prejudice to Defendants

A stay at this juncture will not prejudice Defendants. This case is in its earliest stages. The only substantive motions that have been filed are Defendants' motions to dismiss. This Court has not yet held a case management conference setting forth the litigation schedule governing this matter, nor has it considered any substantive motion.

Indeed, if the stay were to have any effect on Defendants, it would be beneficial and, therefore, in their best interest. For example, parties have met and conferred pursuant to Fed. R. Civ. P. 26. Plaintiffs are, therefore, entitled to, and have, propounded discovery. One of the primary purposes of seeking to transfer this matter, is to facilitate coordinated discovery. Currently, Defendants will have to separately respond to Plaintiffs' discovery requests. A temporary stay would, among other things, relieve Defendants of their obligation to respond to those requests or spend additional time and resources with other pre-trial matters, that may ultimately be duplicated if the matter is transferred.

B. Hardship and Inequity to Plaintiffs

Continuing to prosecute a matter that may get transferred would be a hardship on all litigants and be wasteful of judicial resources. Engaging in law and motion work, scheduling and discovery, that may need to be replicated in another court is an avoidable and unnecessary hardship. Unlike many litigation considerations that require a balancing of the equities, this is not a zero sum game whereby what is beneficial to one party is not for the other. Here, a stay works to the benefit of both Plaintiffs and Defendants. By staying this matter for the short period of time necessary for the MDL Panel to make its decision, neither party will need to expend time, effort or resources on litigation matters that might be mooted by a transfer.[1] Conversely, if the transfer is not granted, the litigation will be delayed for a relatively short period of time, after which both parties may proceed knowing that their efforts will not need to be duplicated.

C. Judicial Economy

"[A] majority of courts have concluded that it is often appropriate to stay preliminary pretrial proceedings while a motion to transfer and consolidate is pending with the MDL Panel because of the judicial resources that are conserved." *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997); *American Seafood, Inc. v. Magnolia Processing, Inc.*, 1992 U.S. Dist. LEXIS 7374, 1992 WL 102762, at *6 (citing *Arthur-Magna, Inc. v. Del-Val Fin. Corp.*, 1991 U.S. Dist.

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[1] "Costs and financial burden on a party having to defend itself in multiple fora is a factor that favors the entry of a stay pending a decision by a JPMDL." *The Hertz Corp. v. The Gator Corp.*, 250 F. Supp. 2d 421, 427 (D. N.J. 2003).

LEXIS 1431, 1991 WL 13725 (D.N.J. 1991)); *Portnoy v. Zenith Laboratories*, 1987 U.S. Dist. LEXIS 16134, 1987 WL 10236, at *1 (D.D.C. 1987).

Here, Plaintiffs are merely asking the Court temporarily stay the case until the MDL Panel reaches a decision. In the short period of time that is required for the MDL Panel's decision, this Court will have to read, consider and adjudicate Defendants' motions to dismiss; consider parties Joint Case Management Conference Statement, determine a schedule for this litigation and may even have to deal with discovery disputes, all of which may be avoided if the Panel decides to relate and transfer this action. From the perspective of judicial economy, there is no doubt that a short stay is the most economical and efficient way to proceed.

Ultimately, the consideration of judicial economy alone, is sufficient to justify a stay. In *Rivers* the Defendants did not argue it would be prejudiced if the Court granted Plaintiffs' motion to stay. Nor did Plaintiffs argue that it would be unduly burdensome to proceed with pretrial matters pending the outcome of the MDL Panel proceedings. *Rivers*, 980 F. Supp. 1358, 1360. Granting the stay, the Court determined that the conservation of judicial resources alone was sufficiently compelling to justify its decision.

> "There are two ways in which judicial resources could be conserved by staying this matter. First, if this case is consolidated with the other cases in Florida and this Court is not assigned by the MDL Panel to preside over the consolidated litigation, this Court will have needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge. And second, any efforts on behalf of this Court concerning case management will most likely have to be replicated by the judge that is assigned to handle the consolidated litigation if the MDL Panel does not consolidate the Disney cases in this Court. Therefore, there is a great deal of this Court's time and energy that could be saved by staying the instant case pending the MDL Panel decision."

Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1360-1361 (C.D. Cal. 1997).

The same reasons underlying the *Rivers* decision are present in the case at bar. Numerous cases have already been coordinated and/or consolidated by the MDL Panel and centralized in the Western District of Washington. If this case is deemed a related tag-along action, then it will

most likely be transferred by the Panel to Judge Pechman in Washington. Any pre-trial efforts by this Court will have been wasted. Similarly, any pre-trial management efforts undertaken by the Court, will likely need to be replicated by Judge Pechman, being that the whole purpose of transfer is to coordinate such pre-trial matters.[2]

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Stay this matter.

Dated: June 20, 2008

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[2] The *Rivers* Court also noted that, "there are no guarantees that an order by this Court would not later be vacated and this Court's investment of time and resources would not have been in vain. Although transferee judges should generally respect any orders of a transferor judge as "law of the case," transferee judges have been known to vacate or modify previous rulings of the transferor judge. *See In re Exterior Siding & Alum. Coil Litig.*, 538 F. Supp. 45, 47-8 (D. Minn. 1982) (transferee court granting class certification even though a motion for certification had already been denied by the transferor court); *In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig.*, 81 F.R.D. 482, 486-87 (E.D. Mich. 1979) (holding that the transferee court may vacate or modify any orders entered by another court). In other words, this Court could go forward with issues related to class certification at this time, but the time and energy that this Court would devote to any rulings it might make regarding certification could be for naught if this action is transferred to another court and that court modifies or vacates any of this Court's orders." *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1361 (C.D. Cal. 1997).

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 12304 Santa Monica Boulevard, Suite 109, Los Angeles, CA 90025.

On June 20, 2008, using the Northern District of California's Electronic Case Filing System, with the ECF ID registered to Michael D. Braun, I filed and served the document(s) described as:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO STAY PROCEEDINGS

The ECF System is designed to automatically generate an e-mail message to all parties in the case, which constitutes service. According to the ECF/PACER system, for this case, the parties served are as follows:

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On June 20, 2008, I served the document(s) described as:

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by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

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I served the above document(s) as follows:

BY MAIL. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on June 20, 2008, at Los Angeles, California 90025.

/S/ LEITZA MOLINAR
Leitza Molinar